Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1485.

RICHARD A. ASH, on Behalf of Himself and on Behalf of BETHLEHEM STEEL CORPORATION,

Petitioner,

v.

CROWDUS BAKER, BERNARD D. BROEKER, STEWART S. CORT, LEWIS W. FOY, CHARLES W. GANZEL, THOMAS S. GATES, GEORGE P. JENKINS, CHARLES B. McCOY, ALBERT M. REED, C. WILLIAM RITTERHOFF, RICHARD M. SMITH, C. THOMPSON STOTT, FREDERIC W. WEST, JR., and JOSEPH S. WRIGHT, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX TO BRIEF.

	Page
OPINIONS BELOW	1
JURISDICTION	1
COUNTER-STATEMENT OF QUESTIONS PRESENTED	2
STATUTES AND RULES INVOLVED	3
COUNTER-STATEMENT OF THE CASE	4
A. The Complaint	4
B. Background of Institution of This Litigation	5
C. Procedural History	6
D. Events Subsequent to the District Court Decision	10
E. The Judgment Below	10
REASONS FOR DENYING THE WRIT	11
I. No Important Question of Federal Securities Law Is Presented for Review in This Case	11
A. The Asserted Conflict Among the Circuits on the Standard of "Materiality" Under SEC Rule 14a-9 Is Already Before the Court	11
B. The Issue of Federal Securities Law on Which It Is Claimed the Circuits Are Divided Is Not Controlling in This Case	12
II. The District Court's Findings Regarding Petitioner's Inequitable Conduct Involve No Federal Question of Importance	14
A. The District Court's Findings of Laches and Bad Faith Are Supported by the Evidence	14
B. The District Court's Discretionary Denial of Injunctive Relief, Based Upon a Balancing of Factors Governing Grant of Injunctive Relief, Involved No Abuse of Discretion and Does Not Merit Further Review by This Court	16
III. This Case Is Moot	17
IV. Conclusion	19

TABLE OF CITATIONS.

Cases: Page

American Home Products Corp. v. Lockwood Manufacturing Co., 483 F. 2d 1120 (6th Cir. 1973) 15
Ash v. Baker, 392 F. Supp. 373 (E. D. Pa. 1975) 7
Ash v. Cort, 350 F. Supp. 227 (E. D. Pa. 1972) 5
Ash v. Cort, 471 F. 2d 811 (3rd Cir. 1973) 5
Ash v. Cort, 496 F. 2d 416 (3d Cir. 1974) 5
Ash v. Cort, 512 F. 2d 909 (3d Cir. 1975) 5
Buckley v. Valeo, No. 75-436 (U. S. Opinion filed January 30, 1976) 5
Carroll v. Princess Anne, 393 U. S. 175 (1968) 18
Columbia Standard Corp. v. Ranchers Exploration & Development, Inc., 468 F. 2d 547 (10th Cir. 1972), cert. denied, 410 U. S. 991 (1973) 15
Cort v. Ash, 422 U. S. 66 (1975) 3, 5, 6, 10, 17, 18
DeFunis v. Odegaard, 416 U. S. 312 (1974) 18
Dunn v. Blumstein, 405 U. S. 330 (1972) 18
Esso International, Inc. v. S. S. Captain John, 443 F. 2d 1144 (5th Cir. 1971) 15
Gerstle v. Gamble-Skogmo, Inc., 478 F. 2d 1281 (2d Cir. 1973) 12, 13
Hecht Co. v. Bowles, 321 U. S. at 329 14
Mills v. Electric Auto-Lite Co., 396 U. S. 375 (1970) 7, 11, 13, 14, 16
Northway, Inc. v. TSC Industries Inc., 512 F. 2d 324 (7th Cir. 1975) 12, 13
Plack v. Baumer, 121 F. 2d 676 (3d Cir. 1941) 15
Roe v. Wade, 410 U. S. 113 (1973) 17
Rondeau v. Mosinee Paper Corp., 422 U. S. 49 (1975) 14
SEC v. Medical Committee for Human Rights, 404 U. S. 403 (1972) 17, 18
Smallwood v. Pearl Brewing Company, 489 F. 2d 579 (5th Cir. 1974), cert. denied, 419 U. S. 873 (1974) 12
Southern Pacific Terminal Co. v. ICC, 219 U. S. 498 (1911) .. 18

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

TSC Industries, Inc. v. Northway, Inc., No. 74-1471, October Term 1975 .....11, 13, 19
United States v. W. T. Grant Co., 345 U. S. 629 (1953) 18

Statutes:

Securities Exchange Act of 1934:
15 U. S. C. § 14(a) 2, 3, 4, 14, 16
15 U. S. C. § 78n(a) 3, 4
18 U. S. C. § 610 ..... 5, 10
28 U. S. C. § 1254(1) 1

Rules:

Federal Rules of Civil Procedure:
Rule 52 7
Rule 52(a) 14, 16
Rule 65(a)(2) 7
SEC Proxy Rule 14a-9, 17 C. F. R. § 240.14a-9 .....2, 3, 4, 7, 11, 12
United States District Court for the Eastern District of Pennsylvania, Local Rule 36 6

Miscellaneous:

11 Wright & Miller, Federal Practice and Procedure § 2946 .. 9, 15

Respondents file this brief in opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit. For the reasons which follow, it is respectfully submitted that the Petition should be denied.

OPINIONS BELOW.

This case was tried without a jury before the Honorable Edward N. Cahn of the United States District Court for the Eastern District of Pennsylvania. The District Court's April 21, 1975 "Memorandum and Order", including Findings of Fact and Conclusions of Law, as amended by Order dated April 22, 1975, are reported at 392 F. Supp. 368, and are adequately set forth in Appendix D of the Petition at A4-A14.

The Judgment entered in favor of defendants in the District Court was affirmed, after oral argument, by a unanimous panel of the United States Court of Appeals for the Third Circuit consisting of Judges Aldisert, Gibbons and Rosenn. The Judgment Order of the Court of Appeals adopting the grounds set forth in the District Court opinion is reproduced in Appendix C of the Petition at A3.

The Orders denying the Petition for rehearing and staying the issuance of the mandate are set forth in the Petition in Appendices B and A, respectively, at A2-A1.

JURISDICTION.

The jurisdiction of the Court is invoked by Petitioner under 28 U. S. C. § 1254(1).

For the reasons set forth below, *infra,* p. 17, however, respondents submit that this Court lacks jurisdiction over the subject-matter because the case has become moot by reason of events which have occurred since the date Judgment was entered in the District Court.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Did the Court of Appeals err in refusing to disturb the District Court's amply documented findings of fact that plaintiff, an attorney, was guilty of bad faith and laches in the institution of this stockholder's suit for injunctive relief under the Securities Exchange Act of 1934 and SEC Proxy Rule 14a-9, where the District Court's finding of bad faith and laches was not "clearly erroneous" but rather was supported by evidence that:

(a) Plaintiff's attorney (and law partner) had written letters to counsel for the corporation in 1973 complaining of the same alleged defect in the proxy material which he ultimately asserted as the basis for this suit, but did not institute suit *until two years thereafter*, in 1975;

(b) Plaintiff did not communicate to the corporation any objection to the corporation's 1974 proxy solicitation, although the 1974 proxy solicitation, like the challenged 1975 proxy material, made no reference to Plaintiff's prior litigation;

(c) Plaintiff attended the 1974 Annual Meeting of Stockholders of the corporation but did not raise any question concerning his prior litigation or the corporation's 1974 proxy solicitation material; and

(d) Plaintiff delayed for one month after the 1975 proxy solicitation material was mailed to stockholders, until approximately 30 days before the 1975 Annual Meeting of Stockholders, to institute this suit seeking eleventh-hour injunctive relief blocking the Annual Meeting?

2. Was the finding of the District Court, sitting as the finder of fact at trial, that the *Cort v. Ash* litigation was not "material" within the meaning of SEC Proxy Rule 14a-9 "clearly erroneous"?

3. Is the present action, brought under the Securities Exchange Act of 1934 and SEC Proxy Rule 14a-9, moot by reason of this Court's decision in *Cort v. Ash*, 422 U. S. 66 (1975) since in the present suit Ash contended that his prior litigation should have been described in the corporate proxy solicitation as material, pending litigation; this Court, after the date of the Judgment of the District Court below, held in *Cort v. Ash* that Ash had no cause of action; summary judgment for defendants in *Cort v. Ash* was thereafter affirmed pursuant to this Court's mandate; the *Cort v. Ash* litigation is no longer pending; and the injunctive relief sought by Ash and denied below, requiring the resolicitation of the stockholders by proxy material describing the now-terminated litigation as pending is, therefore, no longer capable of being framed.

4. Did the Court of Appeals err in concluding that there was no abuse of discretion in the District Court's denial of injunctive relief?

STATUTES AND RULES INVOLVED.

Section 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(a) and SEC Rule 14a-9, 17 C. F. R. § 240.14a-9 are set forth in Appendix E to the Petition at A15.

COUNTER-STATEMENT OF THE CASE.

Petitioner seeks review of the unanimous decision of the Court of Appeals for the Third Circuit (Judges Aldisert, Gibbons and Rosenn, sitting below), affirming on the Opinion of the District Court (Judge Edward N. Cahn) the judgment entered in respondents' favor after a trial without jury in the United States District Court for the Eastern District of Pennsylvania.

A. The Complaint.

Plaintiff, Richard Ash ("Ash"), commenced this stockholder's suit on March 27, 1975, shortly before the 1975 Annual Meeting of Stockholders of Bethlehem Steel Corporation ("Annual Meeting") by filing a one-count, 8-page Complaint charging that defendants, directors of Bethlehem Steel Corporation ("Bethlehem"), had violated the Securities Exchange Act of 1934, 15 U. S. C. § 78n(a) *et seq.*, as amended, and SEC Proxy Rule 14a-9. The Complaint charged that the proxy solicitation material distributed to Bethlehem's stockholders in connection with the 1975 Annual Meeting was "materially misleading" by reason of an alleged "failure to disclose material facts."

The Complaint herein sought an Order declaring all proxies solicited to be null and void, an injunction against Bethlehem, preventing the holding of the 1975 Annual Meeting and judgment for monetary damages against the Directors for any additional costs which might be incurred in resoliciting proxies of the stockholders in the event injunctive relief were granted. No damages apart from such additional expenses were sought in the Complaint.

The gravamen of the complaint was that the proxy solicitation failed to describe as material certain then-pending litigation against Bethlehem and its Directors which had been instituted three years before by plaintiff,

himself. In his prior litigation, captioned *Ash v. Cort*, No. 72-1925 (E. D. Pa. Complaint filed September 27, 1972) ("*Ash v. Cort*"), Ash had alleged that the directors had authorized an expenditure for advertising which Ash contended was violative of 18 U. S. C. § 610, a provision of the federal election laws prohibiting labor unions and corporations from making certain expenditures in connection with federal elections. The advertising challenged in the prior litigation was a general response to attacks which had been made against the business community by certain political figures and neither mentioned the name of any candidate for federal office or any political party, nor contained any other express and unambiguous reference to any candidate, nor contained any express words of advocacy of election or defeat. See, *Buckley v. Valeo*, No. 75-436 (U. S. Opinion filed January 30, 1976) at 38 nn. 51 and 52.

The earlier procedural history of *Ash v. Cort* is summarized in this Court's opinion in *Cort v. Ash*, 422 U. S. 66 (1975), in which this Court held, in reinstating summary judgment entered by the District Court in that litigation in favor of Bethlehem and its Directors, that 18 U. S. C. § 610 does not grant a stockholder an implied, private right of action to sue for alleged violations of the act.[1]

B. Background of Institution of This Litigation.

In March and April, 1973, two years prior to the institution of the present litigation (the second of three suits Ash has brought against Bethlehem and its Directors),

1. The various opinions in *Ash v. Cort* are reported at 350 F. Supp. 227 (E. D. Pa. 1972) (denying preliminary injunction); 471 F. 2d 811 (3d Cir. 1973) (affirming denial of preliminary injunction); 496 F. 2d 416 (3d Cir. 1974) (reversing summary judgment for defendants); 512 F. 2d 909 (3d Cir. 1975) (affirming denial of leave to take discovery pending appeal); 422 U. S. 66 (1975) (reversing 496 F. 2d 416 and reinstating summary judgment for defendants).

Ash, through his attorney and law partner, had by letters communicated to Bethlehem's counsel his objection and opinion that Bethlehem in its 1973 proxy solicitation should have referred to his first suit, *Ash v. Cort*, as material pending litigation. These letters together with Bethlehem's written reply to Ash's grievance were introduced in evidence below. In 1974, while *Ash v. Cort* was still pending, Ash attended Bethlehem's 1974 Annual Meeting. No question was raised by Ash at the meeting or otherwise concerning the omission of reference to *Ash v. Cort*, in Bethlehem's 1974 proxy material.

One month after the distribution of Bethlehem's proxy solicitation for its 1975 Annual Meeting, with just 30 days remaining before the Annual Meeting, Ash filed the present suit, seeking a preliminary injunction blocking the 1975 Annual Meeting, a resolicitation of the proxies of the stockholders, reimbursement for additional solicitation expenses and attorney's fees for Ash's attorney and law partner. No other communication from Ash concerning the proxy material had been received by Bethlehem during the intervening two years. No advance notice of the institution of the suit was provided by Ash. No copy of the complaint was forwarded prior to filing or at the time of filing to counsel for Bethlehem, who had for nearly three years been engaged in the *Ash v. Cort* litigation. No prior notice was provided of the filing of plaintiff's motion for a preliminary injunction blocking the 1975 Annual Meeting, as required by Local Rule 36 of the United States District Court for the Eastern District of Pennsylvania. No effort was made by Ash to provide adequate notice of the institution of the suit thereafter.

C. Procedural History.

A hearing on plaintiff's motion for a preliminary injunction was scheduled before the Honorable Edward N.

Cahn of the United States District Court for the Eastern District of Pennsylvania. Because of the very short period of time remaining before the Annual Meeting, the hearing was expedited and held on April 17, 1975 (A31-138), less than two weeks before the scheduled April 29 Annual Meeting.

By agreement of the parties, approved by the District Court, the trial of this action on the merits was advanced and consolidated with the hearing of plaintiff's application for a preliminary injunction, pursuant to Rule 65(a) (2) of the Federal Rules of Civil Procedure. Plaintiff waived trial by jury, and the case was tried without a jury before Judge Cahn.

On April 21, 1975, upon consideration of the record and the briefs and oral argument of counsel for the parties, the District Court filed a "Memorandum and Order" setting forth its findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure, denying injunctive relief and dismissing the complaint. *Ash v. Baker*, 392 F. Supp. 373 (E. D. Pa. 1975).

The District Court incorporated in its "Findings of Fact" a series of stipulated facts. In addition thereto, after analyzing the applicable standard under Rule 14a-9 set forth in *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 384 (1970), *i.e.* whether the inclusion of the information would have "a significant *propensity* to affect the voting process" (emphasis in original), and after discussing the conflict of authority interpreting the concept of "materiality" under SEC Rule 14a-9, the District Court made the further finding of fact that Ash's prior litigation was not "material" within the meaning of Rule 14a-9. Significantly, the District Court found that measured by *any* of the prevailing legal standards of "materiality," plaintiff's prior litigation was not "material" (A11-A12):

". . . I am of the opinion that the omission from the proxy solicitation documents of the substance and present status of the prior litigation is not material. In the first place, there is now pending before the Supreme Court certain complex and difficult legal issues. The materiality of this prior litigation to the proxy statement depends, at least to a certain extent, on the outcome of the Supreme Court case. In the second place, those cases which have found an omission of a material fact to exist in a proxy statement involve omissions of facts which are definitely significant to the shareholders and not the omission of matters which might not be significant. For example, proxy solicitation documents must include financial information relevant to a merger or acquisition, insider trading or major refinancing. Such omissions are obviously material matters which should be disclosed to shareholders. It may well be that after the Supreme Court issues its opinion in the pending litigation, the substance of that litigation will become material in regard to future proxy solicitations, by Bethlehem. I find that in light of the above findings of facts and the pending litigation in the Supreme Court, *the omission in the proxy solicitation documents for the 1975 annual shareholders meeting of Bethlehem is immaterial under either the 'significant propensity' test or the test of whether the omission might have influenced a reasonable shareholder.* It should be stated however, that this finding is limited to the precise facts of the within case."

(Emphasis added and footnotes omitted)

The District Court went on, in a second, independent basis for its decision, to find that viewed against the background recited above, Ash had acted in bad faith and was guilty of laches in delaying for two years and in waiting for one month after the 1975 proxy solicitation material had been distributed to the stockholders to institute his action for injunctive relief seeking to block the 1975 Annual Meeting on the eve of the Meeting (A12-A13):

"• • • I note that the plaintiff in 1973 requested Bethlehem's management to refer to the prior litigation in its proxy statements. Thereafter, summary judgment was entered for the defendants on July 11, 1973, which was not reversed until April 16, 1974. Following that reversal, plaintiff never again requested the inclusion of information pertaining to the prior litigation, although he attended the stockholders meeting in late April, 1974, until he brought suit in the within action on March 27, 1975. Equitable relief is not extended to a plaintiff who is guilty of bad faith.

'As a matter of public policy, equitable relief typically will not be granted to an individual who has acted in bad faith with respect to the transaction that has been brought before the court.'

Wright & Miller, Federal Practice and Procedure, Civil § 2946.

Plaintiff is guilty of laches and bad faith in bringing this matter to the attention of the Court after the proxy solicitation materials have been sent to the shareholders." 392 F. Supp. 368, 372.

The District Court additionally based its decision denying injunctive relief on its discretionary assessment of the factors governing the grant or denial of injunctive relief. In the exercise of its discretion, the District Court

balanced the possible benefit to the plaintiff and the hardship to defendants and concluded (A13):

> "The substantial expense to Bethlehem of approximately $92,500 [2] to resolicit proxies would be too great in relation to any possible benefit to the shareholders in disclosing the substance of the prior litigation."

D. Events Subsequent to the District Court Decision.

In view of the District Court's decision that the proxy solicitation material was lawful, the Annual Meeting was held as scheduled on April 29, 1975, the proxies were voted and the business of the Annual Meeting was consummated.

After the date of the entry of Judgment in the District Court, this Court rendered its decision in *Cort v. Ash*, 422 U. S. 66 (1975), reinstating summary judgment for defendants therein and holding that there is no implied private right of action under 18 U. S. C. § 610. Pursuant to this Court's opinion in *Cort v. Ash*, the mandate of the Court of Appeals issued, affirming the District Court's entry of Judgment in favor of defendants in *Ash v. Cort*. *Ash v. Cort* is no longer pending litigation.

E. The Judgment Below.

From the District Court's April 21, 1975, Judgment in this litigation, Ash filed a timely appeal. After oral argument, a unanimous panel of the United States Court of Appeals for the Third Circuit, consisting of Judges Aldisert, Gibbons and Rosenn affirmed the Judgment of the District Court "for the reasons set forth in the district court opinion by The Honorable Edward N. Cahn, 392 F. Supp. 368 (E. D. Pa. 1975)."

2. This sum of $92,500 was stipulated by the parties at trial to be the approximate cost of resolicitation of the proxies of Bethlehem's stockholders.

REASONS FOR DENYING THE WRIT.

I. No Important Question of Federal Securities Law Is Presented for Review in This Case.

A. The Asserted Conflict Among the Circuits on the Standard of "Materiality" Under SEC Rule 14a-9 Is Already Before the Court.

Petitioner points to an asserted conflict among the circuits as to the standard of "materiality" under Rule 14a-9 as the principal reason why the Court should review the unanimous decision of the Court of Appeals below. (Petition at 10-12).

The question of the standard of "materiality" under SEC Rule 14a-9 and the alleged conflict among the circuits on this question is already before this Court in *TSC Industries, Inc. v. Northway, Inc.*, No. 74-1471, October Term 1975. In that case the Court granted certiorari on October 6, 1975,[3] and the same issue has been fully briefed. The Court heard argument in the *TSC Industries, Inc.* case on March 3, 1976 (44 U. S. L. W. 3500) and the case is awaiting decision.

The instant Petition presents no important question of federal securities law beyond what is clearly before the Court and fully presented in the *TSC Industries* case.

3. The grant of certiorari in *TSC Industries, Inc. v. Northway, Inc., supra*, embraced the question Petitioner argues should be considered again here:

> "1. Whether 'materiality', under the federal securities laws' prohibition against materially false or misleading statements or omissions, requires only a showing of relevancy and possible importance to 'some few stockholders', as the Seventh Circuit held, or whether it requires a stronger showing of 'significant propensity' to affect shareholders' judgment as this Court stated in *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970)." *TSC Industries, Inc. v. Northway, Inc.*, No. 74-1471, Petition for Writ of Certiorari, at 2.

It is respectfully submitted that no useful purpose would be served by the grant of certiorari in this case, as well, which additionally rests not only on the District Court's finding of fact, after trial, that the matter not referred to in the proxy material was not "material," but also on its finding that Petitioner was guilty of laches and bad faith and on the exercise of its equitable discretion to deny injunctive relief.

B. The Issue of Federal Securities Law on Which It Is Claimed the Circuits Are Divided Is Not Controlling in This Case.

The alleged division of the circuits on the standard of "materiality" under Rule 14a-9 was fully briefed and argued in the District Court and in the Court of Appeals in this case. The District Court reviewed both the test applied by the Seventh Circuit in the *TSC Industries* litigation, *Northway, Inc. v. TSC Industries Inc.*, 512 F. 2d 324 (7th Cir. 1975), and the tests articulated by Judges Wisdom and Friendly, respectively, in *Smallwood v. Pearl Brewing Company*, 489 F. 2d 579 (5th Cir. 1974), *cert. denied*, 419 U. S. 873 (1974), and *Gerstle v. Gamble-Skogmo, Inc.*, 478 F. 2d 1281 (2d Cir. 1973). While the District Court specifically addressed itself to these decisions, it concluded that in this case it was unnecessary to resolve the apparent conflict. Measured by *either* of the competing standards, the District Court found, the result would be the same: the omission here was not material. In this connection, the District Court stated (A10-12):

> "A review of the precedent on the test to determine the materiality of facts omitted from proxy statements reveals two possible approaches. The stricter approach requires inclusion of facts which would have

> "a significant propensity to affect the voting process." *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 384 (1970). Chief Judge Friendly has approved the stricter approach in *Gerstle v. Gamble-Skogmo, Inc.*, 478 F. 2d 1281 (2nd Cir. 1973). The less strict approach is also derived from language in *Mills v. Electric Auto-Lite Co., supra*, and has been formulated by Judge Swygert in *Northway, Inc., v. TSC Industries, Inc.*, — F. 2d — (7th Cir. 1975).
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> *"Under either test I am of the opinion that the omission from the proxy solicitation documents of the substance and present status of the prior litigation is not material.*
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> *"I find that* in light of the above findings of facts and the pending litigation in the Supreme Court, *the omission in the proxy solicitation documents for the 1975 annual shareholders meeting of Bethlehem is immaterial under either the 'significant propensity' test or the test of whether the omission might have influenced a reasonable shareholder."*
>
> (Emphasis added)

The Court of Appeals for the Third Circuit, in unanimously affirming for the reasons stated by the District Court in its Opinion, agreed with this conclusion.

There is no occasion in this case to address the question upon which it is claimed that the circuits are divided. The alleged conflict of the circuits is irrelevant.

Further review in this case would involve the Court in no more than a review of the sufficiency of the evidence in support of the District Court's finding. The Court of Appeals, in affirming the District Court's finding on the question of materiality held that the lower court's finding

was not "clearly erroneous." No important federal question is involved in the question whether the findings of the District Court were supported by the evidence or were "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure, and it is submitted that review by this Court would be inappropriate.

II. The District Court's Findings Regarding Petitioner's Inequitable Conduct Involve No Federal Question of Importance.

A. The District Court's Findings of Laches and Bad Faith Are Supported by the Evidence.

In *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 386 (1970), this Court emphasized that in private actions under § 14(a) of the Securities Exchange Act of 1934 the questions of liability and relief are separate, and that the grant of relief thereunder is to be governed by traditional equitable principles. There, it was stated (396 U. S. at 386):

> "In selecting a remedy the lower courts should exercise 'the sound discretion which guides the determinations of courts of equity,' keeping in mind the role of equity as 'the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'"

This holding was reaffirmed by the Court during the last term in *Rondeau v. Mosinee Paper Corp.*, 422 U. S. 49, 63-64 (1975).

Among the well-established principles applicable in such actions is the familiar rule that the equitable remedy of injunctive relief may, in the trial court's discretion, be withheld from a plaintiff who is guilty of bad faith or

laches. 11 Wright & Miller, *Federal Practice and Procedure* § 2946.

The uncontradicted evidence admitted at trial, concerning the circumstances surrounding plaintiff's institution of this litigation, showed that after having advised the corporation of his objection to the omission from the 1973 corporate proxy material of reference to his earlier litigation, plaintiff delayed for two years before bringing the present action. In the following year, plaintiff raised no objection to the 1974 proxy solicitation, which similarly made no reference to his earlier litigation. Plaintiff personally attended the 1974 Annual Meeting and made no reference to the proxy solicitation. After having apparently abandoned his objection during the years 1973 and 1974, after distribution of the challenged 1975 proxy solicitation material plaintiff waited for approximately one month before filing this suit. With only 30 days remaining before the scheduled 1975 Annual Meeting, and without giving any prior notice to the corporation, plaintiff instituted this litigation seeking eleventh-hour injunctive relief to stop the 1975 Annual Meeting.

From these facts, which are amply supported in the record, the District Court was entitled to find as a fact that plaintiff was guilty of laches and bad faith. Under established principles of appellate review, the District Court's findings on the issues of laches and bad faith may not be disturbed unless found to be "clearly erroneous." *American Home Products Corp. v. Lockwood Manufacturing Co.*, 483 F. 2d 1120, 1124 (6th Cir. 1973); *Esso International, Inc. v. S. S. Captain John*, 443 F. 2d 1144, 1150 (5th Cir. 1971); *Plack v. Baumer*, 121 F. 2d 676, 678 (3d Cir. 1941); *Columbia Standard Corp. v. Ranchers Exploration & Development, Inc.*, 468 F. 2d 547 (10th Cir. 1972), *cert. denied*, 410 U. S. 991 (1973).

A unanimous panel of the Court of Appeals below gave full consideration to and rejected plaintiff's attack on the District Court's findings of laches and bad faith and denied his motion for rehearing, which was directed exclusively to this aspect of the District Court's decision (Appendix B, A2).

Review by this Court, if it were granted, would be limited to the question whether the District Court's findings were "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. The decision of the Court of Appeals affirming the District Court's findings of fact plainly involves no important question of federal law which merits the consideration of this Court. It is respectfully submitted that this Court should not grant certiorari merely to review the sufficiency of the evidence supporting the District Court's findings of fact, which have already been sustained after a full hearing by the Court of Appeals for the Third Circuit.

B. The District Court's Discretionary Denial of Injunctive Relief, Based Upon a Balancing of Factors Governing Grant of Injunctive Relief, Involved No Abuse of Discretion and Does Not Merit Further Review by This Court.

It is axiomatic in actions under § 14(a) of the Securities Exchange Act of 1934 that the question of relief is entrusted to the sound discretion of the trial court. *Mills v. Electric Auto-Lite Co., supra,* 396 U. S. at 386. In the exercise of such discretion and in the determination whether the extraordinary remedy of injunctive relief should be granted, the trial court is bound by familiar principles to balance and assess in the particular factual context before it, the relative importance of competing private and public interests. In the present case, the District Court, as an independent ground of its decision, concluded (A13): "The substantial expense to Bethlehem of approximately $92,500 to resolicit proxies would be too great in relation to any possible benefit to the shareholders in disclosing the substance of the prior litigation."

Under settled rules of appellate review, the District Court's denial of injunctive relief may not be disturbed except upon a showing of abuse of discretion. The Court of Appeals after a full review and oral argument unanimously concluded that the District Court's denial of injunctive relief involved no such abuse of discretion.

The District Court properly exercised its discretion in denying injunctive relief in this case and its findings of fact are fully supported by the record. It is respectfully submitted that no issue is raised by this aspect of the judgment below which merits further appellate review by this Court.

III. This Case Is Moot.

Petitioner sought injunctive relief in the District Court to halt the 1975 Annual Meeting and to require resolicitation of proxies by proxy solicitation material describing his prior litigation as material pending litigation. The complaint sought no damages apart from the additional expense Bethlehem would have incurred had the injunction been granted.

The prior litigation which Petitioner sought to have described in the proxy solicitation material is no longer pending. Pursuant to this Court's decision in *Cort v. Ash,* 422 U. S. 66 (1975), summary judgment in defendants' favor in that case was affirmed. The injunctive relief sought below can no longer be framed.

A case or controversy "must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade,* 410 U. S. 113, 125 (1973); *SEC v. Medical Committee for Human Rights,*

404 U. S. 403 (1972). The federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *DeFunis v. Odegaard*, 416 U. S. 312, 316 (1974).

Measured by these standards, the present case is, therefore, moot.

In a less than candid attempt to impart an air of continuing vitality to this litigation, Petitioner states in misleading fashion that "*Ash v. Cort* is still pending in the Delaware Court of Chancery and is in the pretrial phase."

The Delaware state court action referred to is an entirely distinct lawsuit. It was begun by Petitioner *after* the date of the District Court decision in this case and while this case was on appeal to the Court of Appeals. Petitioner's later suit in state court does not save this case from mootness. Subject-matter jurisdiction over the present litigation cannot be predicated on speculation that Petitioner will remain a stockholder of Bethlehem or that the state court action will still be pending at the time of any future proxy solicitation or that a *later, different* suit might be relevant to some *future* proxy solicitation.

Nor is this a case "capable of repetition, yet evading review." *Compare, Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498 (1911); *United States v. W. T. Grant Co.*, 345 U. S. 629 (1953). Mootness in this case is the product of the independent and unrelated circumstance of this Court's decision in *Cort v. Ash, supra*, itself, not any cause inherent in the subject matter of the former controversy. No fundamental Constitutional rights are implicated. *Compare, Carroll v. Princess Anne*, 393 U. S. 175 (1968); *Dunn v. Blumstein*, 405 U. S. 330 (1972).

Since the claim for damages was limited to consequential damages which would have been sustained by the corporation had injunctive relief been granted and since injunctive relief was denied, there is here no independent damage claim which survives the mootness of the claim for injunctive relief.

IV. Conclusion.

The present case presents no important federal question. The alleged conflict of the circuits relied upon in the Petition is already pending before the Court in the *TSC Industries* case, and was, in any event, found to be irrelevant to the disposition of this case by the courts below.

No useful purpose would be served by further appellate review of the findings of fact of the District Court regarding Petitioner's inequitable conduct or of the District Court's exercise of its sound discretion in denying injunctive relief.

The case was correctly decided below and in its present posture is moot.

For these reasons, it is respectfully submitted that review by this Court would be inappropriate and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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